United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

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P/S

76-1305

To be argued by
GERALD L. SHARGEL

IN THE

United States Court of Appeals

For the Second Circuit

No. 76-1305

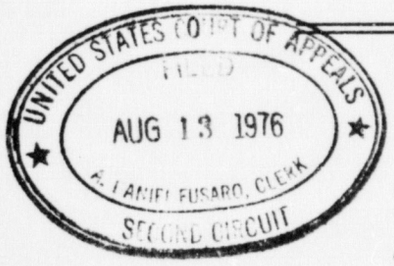
UNITED STATES OF AMERICA,
Plaintiff-Appellee,

against

ANDREW CAVITOLO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF



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BRIEF FOR APPELLANT ANDREW CAVITOLO

Preliminary Statement

The Appellant Andrew Cavitolo appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York (Judd, J.) adjudging him guilty of three counts of violating Title 18, United States Code, Section 894(a); collection of extensions of credit by extortionate means. As a result of this conviction, Appellant Cavitolo was sentenced to a prison term of one year with all but sixty days suspended. In addition, Appellant was fined in the amount of Five Thousand Dollars. Appellant is presently at liberty on bail pending Appeal.

The Indictment appears on page 7 of Appellant's Appendix.

STATEMENT OF THE FACTS

The facts of this case, as they pertain to the single issue raised in this Appeal, may be briefly stated. Appellant Andrew Cavitolo, along with three co-defendants, was charged in an eight count Indictment which alleged two separate and distinct extortionate credit transactions.[1/]

The first three counts of the Indictment pertained to an alleged conspiracy to make extortionate loans for which usurious rates of interest was charged. Andrew Cavitolo was named in two of these first three counts. (Counts 1 and 3) On each of these two counts the jury returned a verdict of not guilty. (T 1822)[2/] The facts underlying the first three counts of the Indictment are not germaine to the issues raised in this Appeal. However, for purposes of completeness these facts will be briefly summarized.

Daniel Gilberti, an unindicted co-conspirator testified that sometime in 1972 he began making usurious

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1/ Co-defendant Anthony De Filippo pled guilty prior to trial. Palma "Pat" Lombardi was acquitted by the jury. Defendant Joel Rakofsky was convicted with Appellant and similarly appeals his conviction in this Court.

2/ The letter "T" refers to the trial transcript while the letter "A" introduces reference to Appellant's Appendix.

loans as an agent for co-defendant Anthony De Filippo. (T 64) De Filippo was alleged to have told Gilberti that the financier of his money-lending operation was Andrew Cavitolo and that Cavitolo was supplying the requisite protection. (T 72, 74) Gilberti also testified that monies were supplied at a later time to co-defendant Lombardi who allegedly had her own customers who were willing to borrow money at the rates called for. (T 78 - 88) Gilberti's lending activity continued until approximately July, 1973, when it was learned that there was an ongoing Federal investigation into this matter. (T 96 - 97)

After describing his money lending business, Gilberti focused on the brief period that he was a proprietor of the Mermaid Gas Station on Neptune Avenue in Brooklyn. (T 101 - 102) In the late spring or early summer of 1972 Appellant Cavitolo asked Gilberti if he would be interested in running a gas station which Cavitolo had net leased. (T 102) Cavitolo's proposal was that Gilberti would operate this gas station in partnership with the defendant De Filippo. (T 102) A corporation was then formed with Gilberti as President and De Filippo as Vice-President and the new entrepreneurs took over the operation of the gas station. Cavitolo would appear daily during this period to pick up the monies which were due him from the operation of the gas station. (T 104) A short time

later Gilberti, apparently dissatisfied with his earnings, became "really fed up" and left the business. (T 115 - 116)

Gilberti's testimony was partially corroborated by consensual tape recordings between the witness and at various times De Filippo and Cavitolo. (T 131 - 132) Additionally there were subsequent witnesses who testified about specific loans which Gilberti had described. (T 409, 422, 438, 461)

As stated, Cavitolo was acquitted on the "Gilberti counts" of the Indictment. The Mermaid Gas Station, however, proved to be Cavitolo's nemesis and led to the incidents which formed the basis of the later counts of the Indictment on which he was convicted.

As Cavitolo would later testify on his own behalf, the Mermaid Gas Station was located directly across the street from the Rivera Catering Hall which was operated by Cavitolo. (T 1368) This catering business had been run by the Cavitolo family for nearly 60 years and for the past 35 years was under the personal supervision of Appellant. (T 1368) In fact, Appellant and his family live in an apartment above the catering establishment. T (1367)

Prior to 1973, the gas station which would later become the Mermaid Gas Station was operated by a company called Midtown Collision. During Midtown's operation of the premises tow trucks and wrecked cars were kept on the

street in a rather unsightly manner. Because of this sight pollution Cavitolo's catering business fell off.

> "It was very bad for my business. I noticed that my business almost dropped a good forty, fifty percent between the time they were there.
>
> "Nobody wants a catering place looking at junk." (T 1370)

In an attempt to salvage his own business, Cavitolo in the beginning of 1973, leased the station and cleaned it up. (T 1371 - 1372) Cavitolo then asked De Filippo, who was his cousin, to take a sub-lease and run the gas station. (T 1373) De Filippo in turn asked Cavitolo if he could take Gilberti as a partner. (T 1375) Only a few weeks passed before trouble began. As noted above Gilberti's version was that he was not earning enough money and was thus "fed up". (T 115 - 116) Cavitolo testified that De Filippo gave too much responsibility to Gilberti and that shortages were occurring in the cash receipts. (T 1379) As Cavitolo testified

> "The figures are not matching with the cash going in." (T 1379)

Cavitolo testified that by the time De Filippo and Gilberti left the gas station he had lost about $18,000 to $20,000. (T 1381)

Following the De Filippo-Gilberti management fiasco Cavitolo leased the gas station to one Rocky Cannechio. (T 1383) For more than one year, Cannechio ran the gas station without any problem. (T 1383) Unfortunately, in more ways than Cavitolo could then

imagine, Cannechio died of a heart attack and the lease reverted back to Cavitolo. (T 1383)

Sal Di Betta, Cannechio's nephew who worked at the gas station, eventually introduced Joseph Perrone, a prospective buyer, to Cavitolo. (T 1385) This Joseph Perrone was to become a key Government witness who, it was claimed, was the victim of an attempt to collect an extension of credit by extortionate means.

Joseph Perrone testified that in late May, 1974, he rented some space at the Mermaid Gas Station in order to repair cars. (T 515 - 516) The space was rented from Sal Di Betta, Cannechio's nephew. (T 516) In June of 1974 Perrone learned that the gas station was for sale and met with Cavitolo. (T 518) Cavitolo said that the sale price was $22,500 and that a down payment of $5,000 was required. (T 519)

Perrone orally agreed to buy the station and a few days later a meeting was held with a lawyer who drew up a contract. (T 522) Several days later, Perrone took over the business. (T 524) The parties had agreed that monies were to be paid Cavitolo in installments until the full purchase price was realized. (T 523)[3/] Before June ended, however, conflict emerged.

3/ There was apparently no interest involved in these payments.

When on June 29t 1974, Cavitolo came to collect monies which were rightfully his, he was told the very unlikely story that a theft had occurred and, therefore, neither Perrone nor Di Betta had money for him. (T 531 - 532) In fact, as Perrone admitted in his testimony, the monies were lost at a race track by the lessees.

> "A. He wanted to know what happened to the money for the gas. Instead of telling him the truth, I told him someone stole two money orders.
>
> Q. And did somebody steal the money orders?
>
> A. No, there were no money orders to begin with.
>
> Q. What happened to the money for the gas?
>
> A. It was used to go to the track.
>
> Q. Who used the money to go to the track?
>
> A. Both Sal and I." (T 532)

Apparently cynical, Cavitolo returned 15 minutes later and told Perrone that if in fact the money orders were stolen they should go to the bank the following Monday in order to "stop those money orders". (T 533) On this visit Cavitolo was accompanied by Anthony De Filippo who according to the witness had a gun in his belt. (T 534 - 535) Also according to the witness, Cavitolo made threats which he said would be carried out if the monies were not paid. (T 536) At this point

Perrone still owed the down payment on the agreement, money for gas which had been put into the station and the security deposit in addition to the installment payment which was due. (T 537 - 540)

Unable to see how he could succeed in repaying Cavitolo, the witness wrote a letter to Appellant and then left home. (T 544 - 545) Several days later Perrone returned. (T 547) Shortly thereafter the defendant Joel Rakofsky came to his house demanding payment on bad checks which had been given to him in return for tools sold and delivered. (T 547)[4/] Perrone told Rakofsky that he would not pay him until he verified that these checks were for tools that were bought at the station. (T 547) Rakofsky then called Cavitolo who allegedly told the witness to come down to the station and that "nothing is going to happen". (T 548)

Perrone testified that he then went to the station with Rakofsky only to be beaten by De Filippo and Cavitolo. (T 550 - 551) After the alleged beating, Rakofsky agreed to find a job for Perrone so that he could make the necessary repayment out of his income. (T 553) As with the witness Gilberti, Perrone's testimony was corroborated in part by the testimony of others. (T 970, 938, 932)

4/ Defendant Joel Rakofsky was in the business of selling tools and equipment to mechanics in gas stations. (T 1133)

Andrew Cavitolo, testifying in his own behalf, also described how Perrone had swindled the gas station money. Cavitolo admitted that because of Perrone's cavalier attitude he slapped him in the face but denied the extensive beating which Perrone described. (T 1400 - 1401) Cavitolo specifically denied any criminal intent in the collection of the monies owed by Perrone.[5/] (T 1412 0 1415)

RULES INVOLVED

PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES.

Rule 4. ALL CASES: TRIAL READINESS AND EFFECT OF NON-COMPLIANCE.

> "In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously

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5/ Cavitolo also denied any involvement in a scheme to lend money at usurious rates of interest, the charges contained in the "Gilberti" counts. (T 1421 - 1425) This testimony was apparently accepted by the jury as reflected by their verdict of acquittal.

requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days."

* * *

Rule 5. EXCLUDED PERIODS.

"(c) The period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period;..."

* * *

"(h) Other period of delay occasioned by exceptional circumstances."

QUESTION PRESENTED

Whether the Government's failure to meet the readiness requirement of Rule 4 of the District Court Plan for Achieving Prompt Disposition of Criminal Cases requires dismissal of the Indictment herein?

(a) Whether a key Government witness was "unavailable" within the meaning of Rule 5(c)(1).

(b) Whether the prosecuting attorney exercised due diligence to obtain the presence of this witness within the meaning of Rule 5(c)(1).

ARGUMENT

THE GOVERNMENT'S FAILURE TO COMPLY WITH THE PROVISIONS OF RULE 4 OF THE DISTRICT COURT PLAN FOR ACHIEVING PROMPT DISPOSITION OF CRIMINAL CASES WAS NOT JUSTIFIED BY ANY EXCLUSIONARY PERIOD CONTAINED IN RULE 5; THE DISTRICT COURT ERRED IN NOT DISMISSING THE "PERRONE COUNTS" OF THE INDICTMENT.

As developed in our Statement of Facts the Indictment in this case was two tiered. Counts 1 and 3[6/] charged Appellant Cavitolo with making extortionate extensions of credit through Anthony De Filippo. These were the so-called "Gilberti counts" on which Cavitolo was acquitted. The remaining counts of the Indictment of which Cavitolo was named in three[7/] alleged extortionate credit transactions with the victim-witness Joseph Perrone. It was on these counts that Appellant was convicted.

This Appeal presents but a single issue. Was it error for the District Court to deny defendant's Motion to dismiss the Perrone counts of the Indictment on the ground that the Government did not meet the Rule 4 readiness requirement of the Plan For Achieving Prompt Disposition Of Criminal Cases (Plan).[8/]

6/ Count 2 charged only the defendant Anthony De Filippo who pled guilty prior to trial.

7/ Counts 4, 5 and 8.

8/ This case falls within the set of rules adopted by the Eastern District of New York pursuant to the requirement of Rule 50(b) of the Federal Rules of Criminal Procedure which became effective on April 1, 1973. The Speedy Trial Act of 1975, 18 U.S.C. Section 3161 et seq became effective on July 1, 1976 and is not retroactive. United States v. Furey, 514 F. 2d 1098, 1101 (2nd Cir., 1975)

As this Court noted in United States v. Flores, 501 F. 2d 1356 (2nd Cir., 1974), "Most important to this case, and others of its ilk,is the chronology of events." Without further ado, the chronology of relevant events in this case is set forth as follows:[9/]

September 27th, 1974. Appellant Cavitolo and co-defendants De Filippo and Rakofsky arrested on a complaint which charged them with using extortionate methods to collect extensions of credit from one Joseph Perrone.[10/]

April 2nd, 1975. Appellant Cavitolo indicted with three others more than six months after the date of the arrest.

April 10th, 1975. Appellant and other defendants arraigned.

May 8th, 1975. Appellant's Motion for dismissal of Indictment filed.

June 6th, 1975. Hearing and argument on Appellant's Motion to dismiss.

July 1st, 1975. District Court's Memorandum and Order denying Motion to dismiss.[11/]

July 8th, 1975. Government files Notice of Readiness.

February 17th, 1976. Trial begins.

9/ The physical manner in which this chronology is presented is borrowed from this Court's opinion in United States v. Valot, 473 F. 2d 667, 668 (2nd Cir., 1973)

10/ This complaint appears in Appellant's Appendix at page 11 A. The complaint did not charge any of the "Giiberti" transactions.

11/ Judge Judd's Memorandum and Order appears in Appellant's Appendix at page 87.

During the more than six month period between arrest and Indictment the Government took no step which in any way could be construed as evidence of readiness for trial. Indeed, the failure to obtain an Indictment within that period conclusively shows that the Government was not ready to take the charges on which Appellant had been arrested to trial. United States v. Bowman, 493 F. 2d 594, 597 (2nd Cir., 1974).

> "Even though the government might be ready to go to trial at an earlier date, its readiness could not become affective as a practical matter until issue had been joined..."

In fact, the Government in this case did not file a Notice of Readiness even after the Indictment had been obtained and filed. At the time of the hearing on June 6th, 1975, more than two months after the Indictment was filed there was still no Notice of Readiness.

"The Court: Mr. La Rossa said the Government had not yet filed a notice of readiness. I don't think there's one yet, is there Mr. Dougherty?

Mr. Dougherty: No, Your Honor, I think the filing of the notice would be academic until Your Honor ruled on the initial motion. The government's theory is that while conceding that in the absence of a showing of extraordinary circumstances to justify delay, some of the counts would be effected. It is our position that the first three counts of the indictment, as far as the defendants Cavitolo, De Filippo and Lombardi are concerned, are not affected by the delay." (A 19 - 20)[12/]

12/ The notice of readiness was actually filed on July 8, 1975, one week after Judge Judd denied the motion to dismiss.

In answer to Appellant Cavitolo's Motion to dismiss in the District Court, the Government filed a Memorandum of Law[13/] which asserted that

> "A hearing may well determine the existence of exceptional circumstances justifying the delay." (A 79)

The Government further reasoned that in any event the first three counts of the Indictment, the Gilberti counts, could still be tried as they were not the subject of the complaint on which defendants were arrested.

> "The practical effect of a finding of the non-existence of exceptional circumstances is, we concede, the dismissal of five counts of the indictment (Counts 4 through 8), and the probable dismissal of count 1 as to Rakofsky." (A 80)

As noted, an evidentiary hearing was held to determine whether exceptional circumstances or any other excludable period provided for by Rule 5 of the then effective Rules was applicable.

It was, of course, the Government's burden to establish the applicability of a Rule 5 exclusionary period in order to salvage the Indictment. United States v. Flores, (supra). In what Appellant claims to have been a woefully inadequate attempt to meet that burden, the Government relied upon the testimony of Charles Domroe, the F. B. I. agent in charge of Cavitolo investigation. (A 42)

13/ That Memorandum is contained in Appellant's Appendix at page 79.

When it came to the actual testimony, the Government abandoned its scatter-gun approach set forth in the memorandum of law (A 80 - 81) and focused on the claimed unavailability of Joseph Perrone, one of the Government's principal witnesses who was the alleged victim of the acts for which Cavitolo was arrested. Of course, if the Government could establish that Perrone was unavailable within the meaning of Rule 5(c)(1) and that due diligence had been exercised to obtain his presence, the period of his unavailability would be excluded from the computation of the time within which the Government must have been ready for trial under Rule 4.

"5. Excluded periods.

In computing the time within which the government should be ready for trial under Rules 3 and 4, the following periods should be excluded:

(c) the period of time during which:

(i) evidence material to the government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe that such evidence will become available within a reasonable period;"

It will be remembered that Appellant and his co-defendants were arrested on September 27th, 1974. Agent Domroe testified that in November of 1974 Perrone was re-located and became enrolled in the marshal's protection program. (A 43) In January of 1975 Agent Domroe was told by the United States marshal's service that Perrone

had left the program. (A 44) The next question was then obvious.

"Q. Did you make any attempt to locate Mr. Peroni (sic)?

A. Yes, I did.

Q. What exactly did you do?

A. Later on in March I spoke with his mother-in-law in Brooklyn. I asked her where Peroni(sic) and his wife and children were. She said she wasn't sure that she would try to contact them and have them in turn contact me and Peroni (sic) did so.

Q. When was that?

A. That was in April." (A 44 - 45) (Emphasis supplied)

This was the entire thrust of Domroe's testimony. Two or three months after he learned that Perrone had left the marshal's protection program he made an attempt to locate the witness which proved successful. Cross-examination of Agent Domroe clearly established that his effort to locate Perrone was at best lackadaisical and off-handed. First, it was revealed that the F. B. I. agent made no effort to ascertain further details when he learned that Perrone had "voluntarily" left the marshal program.

"Q. Did you know what name he was using?

A. No.

Q. Would Mr. Butler[14/] have shown you the form if you wanted to see it?

14/ Benjamin Butler is the United States Marshal for the Eastern District of New York. (A 49 - 50)

A. I don't know.

Q. Did you ask him to see it?

A. No.

Q. Did you ask him what names he was using?

A. No.

Q. When you found out what city it was, did you call your resident agent in that city and tell him to please inquire to see whether he was still living at that address?

A. No." (A 51)

Further examination revealed that not until late March or early April, 1975 did the agent do anything significantly more than hope that Perrone would appear. (A 52 - 56)

"Q. You knew the re-location area, didn't you?

A. (no response)

Q. Did you find out the next of kin from that re-location area?

A. Yes. That's how I got to his mother-in-law.

Q. That's what you did in March?

A. That's right.

Q. But you could've done that in December, couldn't you?

A. Expecting - I could have.

Q. No question about it. You could have done it in January, too?

A. Right.

Q. February?

A. That's right.

Q. The only thing you did was speak to the mother-in-law sometime right after that you got a phone call from Mr. Peroni (sic); is that correct?

A. Right.

Q. Then Mr. Peroni (sic) agreed to come to this district to appear before the grand jury?

A. That's right." (A 57 - 58)

In view of the fact that Perrone's re-appearance in April coincided with the Indictment date which was April 2nd, 1975, everyone, including the Court, assumed that locating Perrone was necessary to obtain an Indictment.

"The Court: It seems to me he must have come back before mid-April if the indictment was dated April 2nd, and if he testified before the grand jury after he was re-located. Maybe I ought to look at the grand jury minutes, as you suggested.

Mr. Dougherty: Perhaps its my fault, but the Court and Counsel seem to be laboring under a misapprehension. He appeared once in the grand jury. I intended to have him appear on a second occasion. He appeared before his relocation in September, and I needed Mr. Peroni(sic) for subsequent appearance. I ought to correct that misapprehension.

Mr. La Rossa: I'm afraid we had no knowledge of that. I think that makes the argument a little more interesting. I now ask Your Honor to take the grand jury minutes of Mr. Peroni (sic) and make the determination based upon those minutes." (A 60 - 61)

The Court then agreed to do so and reviewed these minutes prior to rendering its decision. It should also be noted that the other potential exclusionary periods set forth in the Government's answering memorandum (A 80 - 81) were either withdrawn by the Government attorney or rejected out of hand by the Court in that each of these factual occurances pre-dated the arrest. (A 63) It was also elicited by co-counsel's cross-examination that the consensual tape recordings which proved so vital to the Government's case were both in the possession of the Government and before the grand jury by September or October of 1974. (A 65 - 66)

The Government also, it is submitted, cannot be heard to argue that delay was caused by the fact that broader or additional charges were being prepared for the Indictment. In United States v. Kaye, 334 F. Supp 326, 328 (E.D.N.Y., 1971) it was held that

> "...revelations in the course of investigation indicating that the defendants may also be involved in other criminal schemes does not bear at all on whether the time within which the defendants can be prosecuted on the charges actually brought against them should be extended."

It is clear that the"Gilberti counts" which first appeared in the Indictment and which were not mentioned in the complaint are separate and distinct from the "Perrone counts". In fact, two conspiracies are pleaded (counts 1 and 4). In any event Judge Judd found that substantially all evidence had been presented to the grand jury by January 1975.(A 90)

The Gilberti evidence, therefore, did not contribute to the delay.

On the basis of the testimony and on the basis of the proceedings before the grand jury the Court found that Perrone was "unavailable" within the meaning of Rule 5(c)(1) and that the Government had acted with sufficient due diligence.

> "Since [Perrone] was not in custody and his address was unknown, he was 'unavailable'. (A 91) The F. B. I. agent and the prosecuting attorney might have made more urgent efforts to locate him before they did, but the requirement of 'due diligence' does not mean that the government agents must earn an 'A' for effort in order to claim the benefit of the exclusion. There was ground to believe that Mr. Perrone might surface again. Within a reasonable interpretation of 'due diligence', the court is satisfied that the period of Mr. Perrone's absence should be excluded from the six month period." (A 91 - 92)

As an alternate theory the Court referred to the Rule 5(h) "exceptional circumstances" provision.

> "A witness's voluntary detachment from a relocation program is certainly an unexpected event. Even if the agent be faulted for not exercising the utmost diligence in locating him, the circumstances of this case justify exclusion of the period of his absence as a 'period of delay occasioned by exceptional circumstances'." (A 93)

In reaching this decision the Court found as a matter of fact that Joseph Perrone had testified before the grand jury on September 3rd, 1974. (A 89) It was after this grand jury appearance that Perrone was re-located. (A 89) It is clear from Judge Judd's findings that this Indictment

could have been obtained as early as Sept[illegible] 1974 and in any case, by January, 1975.

> "Almost all the grand jury testimony concerning Mr. Cavitolo was heard during September, 1974. There was additional testimony during December, 1973 about borrowings from a Mr. Gilberti, who may have been a partner of Mr. Cavitolo, and about borrowings from Mr. De Filippo. One significant piece of corroborative evidence with respect to Messrs. Cavitolo and De Filippo was received in January 1975. The next testimony was the testimony of Agent Domroe on April 2nd 1975 concerning the taped conversation between Mr. Perrone and Mr. Cavitolo and a similar conversation with Mr. Rakofsky. It appears, however, that these tapes were available in September, 1974." (A 90)

Rule 4 of the here applicable plan provides in pertinent part that

> "The government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. *** Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed within ten days."

Also contained in the body of Rule 4 is the proviso that

> "If it should appear that sufficient grounds existed for tolling any portion of the six months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance."

The nuts and bolts question for this Court, therefore, is whether Judge Judd was correct in his finding that 1) Joseph Perrone was unavailable within the meaning

of Rule 5(c)(1), 2) that the Government exercised due diligence within the meaning of that rule to locate Perrone and 3) that Perrone's voluntary withdrawal from the marshal's program constituted exceptional circumstances within the meaning of Rule 5(h).

Appellant Cavitolo submits that these rulings were clearly erroneous and that to sustain them would render meaningless the explicit requirement of "due diligence". It should be noted also that the issue presented herein is not one which will fade away with the advent of the new Speedy Trial Act. One exclusionary period provided for in Title 18, U.S.C. Section 3161(h)(3)(A) is

> "Any period of delay resulting from the absence or unavailability of the defendant or an essential witness."

The following sub-paragraph goes on to provide that

> "For purposes of sub-paragraph (A) of this paragraph, a defendant or an essential witness shall be considered absent when his whereabouts are unknown and, <u>in addition, he is attempting to avoid apprehension or prosecution or his whereabouts cannot be determined by due diligence</u>. For purposes of such sub-paragraph, a defendant or an essential witness shall be considered unavailable whenever his whereabouts are known but his presence for trial cannot be obtained by due diligence or he resists appearing at or being returned for trial." (Emphasis supplied)

Under the more specific provisions of this statute, it should be clear that the Government failed to meet their burden of establishing that Perrone was attempting to avoid apprehension or that the Government had

exercised due diligence. Similarly, with regard to Rule 5(c)(1) the Government simply proved that for a particular period Perrone's whereabouts were unknown but they certainly did not prove that he was "unavailable". Indeed, the testimony of Agent Domroe established that the very first effort to locate Perrone by contacting his mother-in-law proved almost immediately successful. The period preceeding the telephone call to Perrone's mother-in-law found Agent Domroe "expecting" Perrone to call him. (A 53) There is simply no way, it is submitted, that "waiting for Perrone" can be construed as the exercise of due diligence required by this or any other statute. Moreover, the Government, who had the burden of proof, failed to establish why Perrone had left the marshal's program. From the nearly immediate response to Agent Domroe's call to Perrone's mother-in-law, it would appear that his departure from the program did not indicate any unwillingness to testify for the Government. Indeed there is no indication throughout this record that Perrone was anything less than a willing witness. The mere fact that Perrone chose not to live under the cloak of the marshal's protection service does not mean that he was unavailable and certainly does not rise to the level of "exceptional circumstances" within the meaning of Rule 5(h). Simply put, the hearing showed that Perrone was available and that the fact that his whereabouts were not known for a period of approximately

105 days (A 9[illegible]) was solely attributable to the F. B. I. agent's failure to call him earlier. There is nothing in this record to indicate that Perrone would not have been available in January, February or March if the agent had simply picked up the phone and made the one telephone call which he eventually made in April.[16/]

In United States v. Rollins, 487 F. 2d 409 (2nd Cir., 1973) (Rollins II),[17/] Judge Oakes noted, in a different context, that

> "...the 'availability' of a witness has been held to depend in some cases on all the facts and circumstances bearing upon the witness's relation to the parties, rather than merely on physical presence or accessibility." 487 F. 2d at p. 412 (Emphasis supplied)

Certainly the witnesses in United States v. Counts, 471 F. 2d 422 (2nd Cir., 1973) (Witness on duty in Viet Nam) and United States v. Boatner, 478 F. 2d 737 (2nd Cir., 1973) (Pregnant witness who couldn't travel from Louisiana to New York) were unavailable in the literal sense of the word. In the instant case there was simply no evidence that Perrone was unavailable and, to the contrary, the

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16/ If this Court rejects the District Court's finding that Perrone was unavailable and that the Government had exercised due diligence to secure his whereabouts, there has been a clear violation of Rule 4. The Government may not seek refuge in the fact that the Indictment was returned some six days after the six month period had elapsed. United States v. McDonough, 504 F. 2d 67 (2nd Cir., 1974).

17/ Rollins' speedy trial claim first came to this Court in United States v. Rollins, 475 F. 2d 1108 (2nd Cir., 1973) (Rollins I)

evidence showed that Perrone was available when called. Had the Government showed a diligent or good faith effort to locate Perrone between January and April, the District Court's conclusions would have been unassailable. The short answer, however, is that the Government did not do so. In Barber v. Page, 390 U. S. 720, 88 S. Ct., 1318 (1968) the Supreme Court stated that

> "...a witness is not 'unavailable' for purposes of the foregoing exception to the confrontation requirement unless the prosecutorial authorities made a good faith effort to obtain his presence at trial".

There is no reason to impose a lesser standard of "unavailability" in the context of the prompt disposition plan. But in any event, even if a less stringent standard of unavailability or good faith is applied, the Government's attempt to locate Perrone in this case was so lacking that it would fail any test that would require anything more than inertia.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of conviction herein should be reversed and the Indictment dismissed.

Respectfully submitted,

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Andrew Cavitolo

Gerald L. Shargel
Of Counsel

Service of three (3) copies of the within
is admitted this 13th day of August 1976

United States Attorney
for the Eastern District of New York
Attorney for the Appellee

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